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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-614

D. W. SHAPS,

Petitioner,

versus

UNION COMMERCE BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

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IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS

The Petitioner, D. W. Shaps, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont entered in this proceeding on February 3, 1972.

OPINION BELOW

The trial court, the 162nd Judicial District Court of Dallas County, Texas, did not write an opinion. The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas is reported at 476 S.W. 2d 466, and is printed in Appendix A to this petition (pp. 1a-5a, *infra*).

JURISDICTION

The judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont was entered on February 3, 1972. A timely motion for rehearing was denied on February 24, 1972. (See Appendix C, p. 8a, *infra*) The Supreme Court of Texas denied a timely-filed application for a writ of error on May 3, 1972, and a motion for rehearing of its denial on July 26, 1972, (See Appendix D, p. 9a-10a, *infra*), and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether an Ohio judgment on a cognovit note obtained in accordance with Ohio Revised Code, Section 2323.13 as it existed on November 30, 1967, is constitutionally invalid under the due process clause of the Fourteenth Amendment because Petitioner was deprived of both notice and an opportunity to be heard prior to judgment, and an opportunity to defend the action on the note on the merits subsequent to judgment.

2. Whether a contractual waiver of constitutional rights in a civil proceeding is governed by the criminal standard that the waiver be voluntarily, intelligently, and knowingly made.

STATUTORY PROVISIONS INVOLVED

Ohio Revised Code, Section 2323.13, as it read at the time the judgment assailed herein was entered in 1967, is set out below. This statute was subsequently amended, and the amended provisions are set out in Appendix B to this Statement.

OHIO REVISED STATUTES

Section 2323.13(11597) Warrant of attorney to confess

An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the Court before which he makes the confession, which shall be in the county where the maker resides or in the county where the maker or any one of several makers sign the warrant of attorney authorizing the confession of judgment, any agreement to the contrary notwithstanding; and the original or copy of the warrant shall be filed with the clerk.

STATEMENT OF THE CASE

The instant suit arose out of the execution by the Petitioner of a promissory note containing a cognovit clause which provided:

"The undersigned, and, if more than one, each of the undersigned, hereby authorizes any at-

> torney-at-law to appear in any court of record in the State of Ohio, or in any other state of federal district of the United States, at any time or times after the above sum becomes due, and waive the issuance and service of process and confess judgment against any one or more, or all of them, severally or jointly, in favor of any holder of this note, for the amount then appearing due, together with the costs of suit, and thereupon to release all errors and waive all rights of appeal and stay of execution. No judgment or judgments against less than all of the undersigned shall be a bar to a subsequent judgment or judgments against any one or more of the undersigned against whom judgment has not been obtained hereon." (See Appendix E, p. 11a-12a, *infra*.)

The note was executed on January 13, 1965, in Cleveland, Ohio, where Petitioner was an employee of The Charles Corporation. Later that year, in July, the Petitioner left the employment of The Charles Corporation and moved to Dallas County, Texas, where he has continuously resided to the present time. The principal balance of the note was $20,000.00, at an interest rate originally set at 5-1/4%. However, between the dates of February 11, 1965, and October 3, 1967, twenty-nine separate payments were made against the principal and interest owing on the note, reducing the liability to $17,716.54. None of these payments were made by the Petitioner, nor did he have any knowledge of the fact that payments had been made. In addition, the interest rate of the note was increased twice, to a final

rate of 6-3/4%, the increases occurring without the knowledge or consent of the Petitioner. Payment of the note was guaranteed by Petitioner's former employer, The Charles Corporation.

On November 30, 1967, the Respondent, as holder of the note, filed suit in the Court of Common Pleas of Cuyahoga County, Ohio, and obtained a judgment for the sum of $17,899.23, plus interest. The Petitioner was not advised of the filing of suit, or taking of judgment, all of which was accomplished within a few hours on the same date, to-wit, November 30, 1967. Judgment was taken pursuant to an Ohio statute which permitted any attorney to appear before the court, produce the warrant authorizing confession of judgment, and confess the judgment. The statute contained no provision for notice to the maker of the note, either before or after judgment. Accordingly, Petitioner's first notice of the fact that a judgment had been entered against him came in the Respondent's letter of January 8, 1968. (S. F. 53, 54, 55)[1]

The circumstances surrounding the execution of the note are important for an understanding of the issues raised by Petitioner herein. In late 1964, the Respondent was the chief banking source for the Petitioner's former employer, The Charles Corporation, and in fact had loaned The Charles Corporation in excess of $760,000.00. In the course of his employment, the Petitioner

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[1] "S. F." citations are to the Statement of Facts of proceedings before the trial court, which constituted part of the record in the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, at Beaumont, and is Document 4 of the certified record in this cause.

attended conferences between representatives of these two companies where concern was expressed by the bank that the debt structure of The Charles Corporation, as compared to the paid-in equity, was too heavy. As a result of this concern, a plan was devised whereby employees of The Charles Corporation would sign notes with the Respondent bank, the proceeds therefrom to be used to buy stock in The Charles Corporation, thus increasing the paid-in equity. The Charles Corporation would then pay some of its outstanding debt to the Respondent bank using the cash realized from the sale of the stock, and thereby reduce its debt structure.

The stock purchased with the proceeds of the loans was used to collateralize the notes signed by the several employees involved. According to the Petitioner's interpretation and understanding of the plan, it was understood by all of the parties involved that the individual employees who signed the notes had no personal liability thereon. The object of the carefully conceived transaction was to improve the balance sheet structure of The Charles Corporation without actually altering the nature of the obligations existing between it and the Respondent bank. As a consequence of this plan, Petitioner was not required to make an application for the loan; his credit was never checked, (although he was not in a position to collateralize the note); he never received the loan proceeds; and the stock purchased with the proceeds of the note was endorsed over to The Charles Corporation and left in the possession of the bank. Although The Charles Corporation was purportedly a guarantor of the note, it

actually paid the 29 payments made against the balance owing on Petitioner's note.

When Respondent filed suit in the District Court of Dallas County, Texas, in 1969, seeking to obtain recognition of the Ohio judgment pursuant to the full faith and credit provisions of the United States Constitution, the Petitioner countered with the pleas that the Ohio court had no in personam jurisdiction to render the judgment involved, and further that the facts disclosed above indicate that there was fraud in the procurement of the judgment. (Tr. 3-6)[2] Although trial was to a jury, at the close of all of the evidence the trial court granted Respondent a directed verdict, affording full faith and credit to the Ohio judgment. (Tr. 17 and 18)

Among other things, Petitioner's assignments of error before the Court of Civil Appeals urged that the Ohio judgment was obtained in violation of his Fourteenth Amendment rights, and further that the Ohio courts were without in personam jurisdiction, and accordingly the judgment was not entitled to full faith and credit.[3] The decision of the Court of Civil Appeals affirmed the judgment, mischaracterizing Petitioner's assault thereon as solely one of in personam jurisdiction, and ignoring the issue of whether the due proc-

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[2] "Tr." citations are to the Transcript of Record in the trial court, which constituted part of the record in the Court of Civil Appeals for the Ninth Supreme Judicial District of Beaumont, and is Document 1 of the certified record in this cause.

[3] These assignments of error are contained in Points of Error 1 and 4 of the Brief of Appellant, D. W. Shaps, filed in the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, constituting Document 5 in the certified record of this cause.

ess clause of the Fourteenth Amendment to the United States Constitution had been violated. (See Appendix A, p. 1a-5a, *infra*) As to the defense of fraud in the procurement of the judgment, the Court of Civil Appeals defined the fraud as intrinsic in nature and, therefore, inadmissible in the action upon the judgment. (See Appendix A, p. 3a-5a, *infra*.) Petitioner reasserted in his Motion for Rehearing to the Court of Civil Appeals his assignments of error relating to the procedural due process issues, in addition to the question of whether the Ohio court had in personam jurisdiction.[4] On February 24, 1972, the Court of Civil Appeals overruled his Motion for Rehearing without further opinion. (See Appendix C, p. 8a, *infra*.)

Petitioner again asserted his constitutional issues in the timely-filed Application for Writ of Error addressed to the Supreme Court of Texas.[5] The Supreme Court of Texas refused the Application for Writ of Error and, on July 26, 1972, overruled Petitioner's Motion for Rehearing thereon. (See Appendix D, p. 9a-10a, *infra*)

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[4]These assignments are contained in Point 1 and Point 4, Appellant's Motion for Rehearing before the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, which is Document 9 in the certified record in this cause.

[5]The assignment of error relating to the constitutional issue were contained in Points of Error 1 and 4 of the Application for Writ of Error from the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont which constituted the record in the Texas Supreme Court and is Document 11 in the certified record of this cause.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Illustrates The Continuing Judicial Controversy And Confusion Over The Applicability Of The Constitutional Concepts Of Due Process To A Cognovit Judgment.

In historical perspective, cognovit judgments have not occupied much of this Court's attention.[6] During the pendency of the instant appeal, this Court rendered its decisions in *Overmyer v. Frick*, 405 U. S. 174 (1972) and *Swarb v. Lennox*, 405 U.S. ____ (1972), thereby doubling the number of its opinions dealing with cognovit notes. The latter decisions indicate that the expanding concepts of due process are threatening to engulf cognovit provisions contained in contractual instruments, and thereby satiate the vociferous critics of the cognovit procedure. Nevertheless, the instant appeal illustrates the fact that those opinions have not quelled the raging controversy over the applicability of the constitutional guarantee of due process to a judgment obtained as a result of a cognovit clause in a contractual instrument. In fact, both decisions were ignored by the Court of Civil Appeals in the opinion rendered below, which also omitted the slightest reference to the due process claims of the Petitioner. (Appendix A, p. 1a-5a, *infra*.) The seriousness of the issue of whether summary judicial processes, such as cognovit judgments, constitute a deprivation of property

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[6]Prior to 1972, the United States Supreme Court had issued only two Opinions involving cognovit notes. *National Exchange Bank v. Wiley*, 195 U.S. 257 (1904); *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U.S. 287 (1890).

without due process of law is proven by the fact that such issue has been the subject of no less than three opinions of this Court in the past twelve months.[7]

With that background, the failure of either the Court of Civil Appeals or the Texas Supreme Court to recognize the basic constitutional issues raised herein is a glaring indication of the controversy that still lies ahead.

The controversy arises out of the lack of defined guidelines or standards that determine when due process is violated in a cognovit judgment situation. Although this Court's holding in *Overmyer* was a negative one, to the effect that cognovit judgments are not *per se* unconstitutional, that decision tacitly invites further constitutional attack on cognovit judgments where the facts involved differ from those stated in the opinion. The facts of the present appeal illustrate the purpose behind the limited applicability of *Overmyer*.

The Ohio statute which supported the judgment in this case was the predecessor in time to that which was involved in *Overmyer*. The initial statute provided only that an attorney appear and file a copy of the warrant of confession for judgment to be entered. In *Overmyer*, the statute had been amended to require that the last known address of the defendant be listed in the petition so that upon entry of judgment the Clerk of the Court could notify the Defendant of the fact that

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[7]*Overmyer v. Frick*, 405 U.S. 174; *Swarb v. Lennox*, 405 U.S. ____, 92 S.Ct. 767 (1972), *Fuentes v. Shevin*, 405 U.S. ____. See also *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969).

judgment was taken. *Overmyer v. Frick, supra,* 29 S. Ct. at p. 777.[8] The benefit of the statutory change between the time of this Ohio judgment and that assailed in *Overmyer,* providing for notice to the defendant of the entry of judgment against him, is seen in the fact that in the *Overmyer* case within ten days of the entry of judgment, Overmyer, through its attorney, had filed in the Ohio courts a Motion to Stay Execution of the Judgment and for a New Trial. Subsequently, a full hearing was held. No such advantage accrued to the Petitioner herein, whose first notice of the entry of judgment against him came more than thirty days after the fact, denying him such recourse. The time lapse was even more crucial for this Petitioner since he had been, at the time of the entry of judgment, a resident of the State of Texas for over two years, maintaining no contacts with the State of Ohio. One of the Overmyer corporate segments, was actually a resident of Ohio, and one of the notices of the entry of judgment mailed by the Clerk of the Ohio Court involved was sent to an Ohio address. Thus Overmyer, being within the confines of the State of Ohio, had competent as well as timely access to the Ohio court. This Petitioner had no such protection.

In the *Overmyer* situation, the cognovit note was executed in consideration for the release of mechanic's

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[8]As of September 16, 1970, the Legislature of Ohio further amended the statute to provide that any note or other contractual arrangements executed after January 1, 1971 containing a warrant of attorney for confession of judgment would be invalid unless a warning was set forth in clear and conspicuous type that by signing the document the debtor was waiving his rights to notice and court trial. (See Appendix B, *infra.*)

liens against the maker of the note, for reductions in the amount of monthly payments due under the note, for additional time in which to pay the debt, and for a reduction in interest rate, all of which was the culmination of negotiations conducted through corporate parties with the advise and consent of counsel. This Petitioner's circumstances were drastically different. He, along with several other employees, agreed to execute promissory notes, which contained a cognovit clause, with the understanding that his employer would be responsible for the balance owing. Petitioner personally received no consideration for the note; he was not given an opportunity to spend the money as he desired nor was he given the proceeds of the note. Rather, the proceeds were used to buy stock in his corporate employer which Petitioner was required to endorse over to his employer, and which was technically used to collateralize the note. The Petitioner's vigorous assertions that he never had personal liability on the note are supported by the fact that he did not make an application for the loan. No credit check was made of his personal finances (despite his testimony that he was not financially able to collateralize a loan of this magnitude); his employer made twenty-nine payments on the note; and the interest rate on the note was changed twice without his knowledge. Finally, of paramount importance is the fact that from January, 1965, when the note was executed, until October of 1967, the Respondent bank never contacted the Petitioner in any regard concerning the liability. In spite of his vigorous assault on the Ohio judgment on the grounds of fraud, the Texas courts turned deaf ears on his cause, rationalizing that such attack constituted

an intrinsic fraud and was therefore not a defense to an action on the judgment. (See *United States v. Throckmorton,* 98 U.S. 61 (1878)) Under time honored principles, no defense may be entertained which goes to the merits of the original controversy in an action upon a sister state judgment. *Milwaukee County v. White Co.,* 296 U.S. 268 (1935). Thus, unlike Overmyer's situation, this Petitioner was denied a post-judgment hearing in Ohio on the merits, and was further denied an opportunity to defend on the merits in the action at bar.

Finally, this Court in *Overmyer* concluded that cognovit notes can serve legitimate and rational business purposes and in such circumstances are not unconstitutional *per se.* Unquestionably, in that case, the cognovit provision in the second note was the consideration for the extension by the Frick Company of the financial obligations of Overmyer. In the instant situation, however, the Petitioner had no opportunity to bargain for or against the clause in the note. In fact, the Petitioner indicates that he had no opportunity whatsoever to negotiate the terms of the promissory note, since the proceeds of the note were designed to be used for a specific purpose which served no financial advantage to him. The instant situation, unlike *Overmyer,* is not a case of the Petitioner being in dire financial straits and requiring a loan of the magnitude involved herein. Nor is it a case where the maker of the note had made an individual investment decision and needed financial backing. The financial irresponsibility involved in this case is that of the Respondent bank in overextending its loan commitments to The

Charles Corporation, which subsequently undertook bankruptcy proceedings. After two years of silence the Respondent bank finally contacted Petitioner concerning his alleged liability, on the eve of the institution by The Charles Corporation of bankruptcy proceedings.[9] This delay of over two and one-half years deprived Petitioner of the opportunity to institute legal action against The Charles Corporation. Thus, not only was the Petitioner in this instance denied an opportunity to defend an action against him by Respondent on the note, either before or after entry of judgment, but, as a result of the laches of the Respondent in asserting the liability, he was also deprived of any opportunity he might have had to carry an action over against his former employer. Whereas Overmyer was able to institute a breach of contract action against Frick in a separate court, this Petitioner has been denied access to any court, on any of his defenses.

The concept of due process, requiring at a minimum that notice and opportunity for hearing appropriate to the nature of the case precede a deprivation of property, is deeply engrained in our judicial system. *Mullane v. Central Hanover Trust Company*, 339 U.S. 306 (1950), *Boddie v. Connecticut*, 401 U.S. 371 (1971). Due

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[9]The record shows that the first contact the Petitioner had directly from the respondent concerning the note was a letter forwarded to him at his home address in Texas in October 1967, demanding additional collateral for the note. The Petitioner replied, expressing his surprise and demanding a copy of the note, which apparently he did not have. In a letter of October 20, 1967, marked as Defendant's Exhibit No. 6 from the Respondent Bank, the Petitioner was advised for the first time that The Charles Corporation had filed for bankruptcy proceedings.

process encompasses even a temporary, prejudgment seizure of property, consisting of a mere possessory interest, where an opportunity for full hearing on the merits may follow. *Fuentes v. Shevin*, 405 U.S. ____, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). The statutory scheme underpinning the Ohio judgment in this case goes far beyond the permissible bounds of minimum procedural due process as defined in the *Boddie* and *Fuentes* opinions. Unlike the situation in *Overmyer*, the statute here was guaranteed to deny to a defendant subjected thereto any recourse to courts, prejudgment or post-judgment, for a meaningful and fair hearing on the merits. The facts of the instant case fly in the face of the record in the *Overmyer* opinion. Nevertheless, the appellate tribunals below stood mute on the issues involved, apparently reluctant to define a violation of federal due process where existing judicial precedents have such limited relevancy or applicability.

2. The Decision Below Confuses The Standards To Be Applied In Determining Whether Constitutional Rights Have Been Waived By An Individual In A Civil Action.

The opinion of the Court of Civil Appeals below, when considered in the light of the refusal of the Texas Supreme Court to review that judgment, reflects significant confusion on the part of these appellate tribunals with reference to the appropriate standard to be applied in determining whether an individual in a civil action has waived certain constitutionally guaranteed rights. Initially, the opinion below appears to stand

mute on the issue of whether the Petitioner waived his rights to notice and hearing. Closer analysis reveals, however, that the Court of Civil Appeals actually implied a waiver, and, in so doing, used a standard less than that applied in criminal situations of a "knowing and intelligent waiver". *Overmyer v. Frick, supra; Fuentes v. Shevin, supra.*

The court below reasoned that the act of executing the note containing the cognovit provision at the time Petitioner was an Ohio resident constituted a sufficient basis to establish in personam jurisdiction of Petitioner in the Ohio court. (Opinion, Appendix A, p. 1a-5a, *infra.*) The Court was thus concluding that the Petitioner had consented to subject his person to the jurisdiction of the State of Ohio in accordance with the Ohio statute sanctioning confession procedures. The thrust of the Court's rationale is that the Petitioner had consented to waive all constitutional rights of notice and hearing by the mere execution of the contractual instrument in question.

The *Overmyer* decision, although declining to decide the standard applicable, discusses the issue of waiver in terms of the criminal test of "knowing and intelligent waiver". *Overmyer v. Frick, supra,* 92 S. Ct. at p. 782. This Court concluded that, whatever the standard to be applied, Overmyer had certainly made a knowing and intelligent waiver of its constitutional guarantees.

Subsequently, in the *Fuentes* opinion, this Court made further reference to the guidelines applicable in determining whether a waiver of constitutional

rights in a civil proceeding had occurred. Again, declining to define a standard for civil proceedings, this Court noted that "for a waiver of constitutional rights in any contest must, at the very least, be clear. The contractual language relied upon must, upon its face, amount to a waiver." *Fuentes v. Shevin, supra,* 32 L. Ed. 2nd at p. 579. Reasoning that language which provided that a seller "may take back" or "may retake or repossess" merchandise did not amount to contractual language which on its face constituted a waiver, the decision concluded that the seizure of property came in violation of due process.

From these two opinions, the only guidelines available for a judicial determination of waiver in a civil situation is that the language used in the contractual instrument must clearly set out the specific constitutional guarantees being waived. Still unresolved is the question of whether something more than clear, contractual language is required to prove a waiver.

The note involved in the instant appeal provides that an attorney at law may appear and "waive the issuance and service of process and confess judgment" and further "release all errors and waive all rights of appeal and stay of execution." (Plaintiff's Exhibit 1)[10] Under present Ohio statutes, this language would not be sufficient to support a cognovit judgment. The Ohio Legislature in 1970 added the requirement that a contractual instrument containing a cognovit provision also set forth, in clear and conspicuous type, the following caveat:

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[10]Appendix E, *infra.*

> "Warning — By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause." (See Appendix B, page 6a-7a *infra*.)

Although this legislative amendment will not aid the Petitioner in this cause, it does indicate the serious concern of the Ohio legislature for the constitutionality of the previous statutory language.

The correctness of the decision in this case is subject to question since the Texas Court implied a waiver on the basis of the language used in the note. Assuming, *arguendo*, that the contractual language involved in this appeal does, "on its face amount to a waiver", *(Fuentes v. Shevin, supra)*; the essential question is whether it was incumbent upon the Respondent to prove a "knowing and intelligent" waiver.

The Respondent herein has made no showing that this Petitioner was actually aware or made aware of the significance of the cognovit clause in the note. Coupled with the vigorous assertion by the Petitioner that he was not personally liable on the instrument he signed, and was thus not bound by it, the evidence of waiver in this record is certainly not sufficient to

meet the test applied in criminal situations of a "voluntary, knowing and intelligent waiver". The appellate tribunals below refused to concern themselves with the question of whether the Petitioner had personal liability on the note, characterizing this as a defense of intrinsic fraud. Thus, the standard applied by the courts below in determining whether the Petitioner made a waiver of constitutional guarantees clearly eliminates from consideration the issue of knowledge and intent.

By eliminating the elements of "knowing and intelligent" from the standard to determine waiver, the appellate tribunals below were forced to presume that the Petitioner intended to be bound by the cognovit provision in the contractual instrument. The test applied thus conflicts with the tenet that a court should indulge every reasonable presumption *against waiver*. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 at 393 (1937). This Court has previously declared that it will not "presume acquiescence in the loss of fundamental rights". *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292 at p. 307 (1937). Accordingly, inherent conflict will result from the application of a standard in civil situations, regarding waiver of constitutional guarantees, less than the criminal standard of knowing and intelligent waiver. Until a standard is defined which sets forth in clear and unequivocal terms the judicial guidelines governing waiver in civil situations involving individuals and their contractual relationships, considerable confusion must be expected with its concomitant litigation.

CONCLUSION

For these reasons, the Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.

D. W. SHAPS,

Petitioner,

versus

UNION COMMERCE BANK,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this ____day of October, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to James H. Baumgartner, Jr., Esquire, Akin, Vial, Hamilton, Koch & Tubb, 1500 Republic National Bank Tower, Dallas, Texas 75201, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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APPENDIX A

OPINION

IN THE
COURT OF CIVIL APPEALS
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT BEAUMONT

No. 7308

Appeal From The 160th District Court
Dallas County, Texas

D. W. SHAPS,

Appellant,

versus

UNION COMMERCE BANK,

Appellee.

Plaintiff, Union Commerce Bank, brought this action against defendant, D. W. Shaps, upon a judgment plaintiff obtained against defendant in the State of Ohio. Trial was by jury but at the close of all of the evidence, the trial court directed a verdict for plaintiff. The parties will be referred to here as they were in the trial court.

The first series of points of error contend the Ohio judgment was not entitled to full faith and credit by the trial court. The record in the Ohio court shows there was no service of process upon defendant and

defendant argues that the Ohio court had no in personam jurisdiction upon him to render judgment.

The evidence shows: The defendant executed a demand note payable to plaintiff in the amount of $20,000 on January 13, 1965. That defendant was residing in Ohio at the time and executed the note there. Such note contained this provision:

> "The undersigned, and, if more than one, each of the undersigned, hereby authorizes any attorney-at-law to appear in any court of record in the State of Ohio, or in any other state or federal district of the United States, at any time or times after the above sum becomes due, and waive the issuance and service of process and confess judgment against any one or more, or all of them, severally or jointly, in favor of any holder of this note, for the amount then appearing due, together with the costs of suit, and thereupon to release all errors and waive all rights of appeal and stay of execution."

That defendant left Ohio in July of 1965 and moved to Dallas, Texas, where he has since maintained his residence. Thereafter, plaintiff made demand upon defendant for payment of such note, which defendant failed and refused to pay. Defendant had no actual notice of the suit filed against him in Ohio and was not served with process. November 30, 1967, the suit was filed and judgment taken against defendant in the Ohio court. A certified copy of the petition filed in Ohio

shows a default by defendant in the payment of his note. A certified copy of an answer filed in the Ohio court signed by Joseph H. Mehelick as attorney for defendant in effect enters an appearance for defendant, waives service of process, and confesses judgment.

Defendant [sic] filed a motion in the Dallas court pursuant to *Rule 184a* asking the court to take judicial notice of the laws of the State of Ohio and quoting from an Ohio statute which makes provision for the confession of judgment in that state.

The Dallas court found in its judgment that the Ohio judgment was regular on its face in all respects; that it was obtained in its entirety pursuant to the laws of the State of Ohio as they existed on the date of such judgment; and that the Ohio judgment was entitled to full faith and credit in the State of Texas under Art. 4, § 1 of the Constitution of the United States of America.

We have been satisfied that the law of the State of Ohio provides for judgment by confession as we have in the case before us. *Ohio Civil Statutes, Art. 2323.13 (11597). Bulkley v. Greene*, 98 O.S. 55, 120 N.E. 216. *Swisher v. Orrison Cigar Co.*, 122 O.S. 195, 171 NE 92. Defendant has cited us no authority to the contrary.

There is a long line of authority in Texas that even though Texas does not permit a judgment to be obtained by confession (as in the case before us), a judgment by confession obtained upon a judgment note in

a foreign state recognizing such procedure will be given full faith and credit in Texas under Art. 4, § 1 of the United States Constitution. *Scott Paper Company v. Johnson*, 406 S.W.2d 548 (Tex.Civ.App., Waco, 1966, no writ); *Hastings v. Bushong*, 252 S.W. 246 (Tex.Civ. App., San Antonio, 1923, error dism.), 39 A.L.R.2d 1232-1260; *Baumgardner v. Southern Pac. Co.*, 177 S.W.2d 317 (Tex.Civ.App., El Paso, 1943, no writ); *Bernard Gloeckler Co. v. Baker Co.*, 52 S.W.2d 912 (Tex.Civ. App., El Paso, 1932, no writ).

Defendant also contends his pleadings and the evidence raise a question of fact for the jury to have determined as to his defense of fraud in the procurement of the Ohio judgment. Defendant admitted that he executed the note in question which contained the confession of judgment clause. He also admitted the proceeds of the loan obtained from plaintiff were used to purchase one thousand shares of stock in the Charles Corporation which was his employer at the time. The scheme, which he labels as fraud, is that he was one of many employees of the Charles Corporation entering into a plan to buy such stock so the money borrowed by the employees would be used to adjust the debt structure of Charles Corporation with plaintiff. That a bookkeeping entry was made to reduce the corporation obligation to plaintiff and increase the capital stock of such corporation.

We have concluded this plan, even if established as a matter of law to be fraud, would be intrinsic fraud and not extrinsic fraud or fraud in procurement.

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The defense interposed in the court below was a collateral attack under the decisions. *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940); *Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488 (1947). It is likewise clear that in a suit upon such judgment, no defense may be set up which goes to the merits of the original controversy. *Milwaukee County v. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220 (1935).

There is no showing that the alleged fraud was extrinsic; and, as a matter of fact, it is clear that if there was any fraud, it was intrinsic in nature. Fraud must be extrinsic to constitute any defense to the action upon the judgment. *Crouch v. McGaw*, 134 Tex. 633, 138 S.W.2d 94 (1940); *United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1878). See also *Midessa Television Co. v. Motion Pictures for Television*, (5th Cir. 1961) 290 F.2d 203, cert. den., 368 U.S. 827, 82 S.Ct. 47, 7 L.Ed.2d 30 (1961). Jurisdiction was not obtained over the defendant by fraud as shown by the circumstances outlined above.

AFFIRMED.

Homer E. Stephenson
Associate Justice

Opinion delivered
February 3, 1972

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APPENDIX B

OHIO REVISED CIVIL STATUTES

Section 2323.13 — Warrant of attorney to Confess; Warning Required.

* * * *

(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession. Notwithstanding any agreement to the contrary, if the maker or any of several makers resides within the territorial jurisdiction of a municipal court established under section 1901.01 of the Revised Code, or signed the warrant of attorney authorizing confession of judgment in such territory, judgment on such warrant of attorney shall be confessed in the municipal court having jurisdiction in such territory, provided the court has jurisdiction over the subject matter; otherwise, judgment may be confessed in any court in the county where the maker or any of several makers resides or signed the warrant of attorney. The original or a copy of the warrant shall be filed with the clerk.

(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified letter mailed to him at the address set forth in the petition.

(D) A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other evidence of indebtedness executed on or after January 1, 1971, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the signature of each maker, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:

"Warning — By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause."

(1970 S 85, eff. 9-16-70. 132 v H 614; 128 v 137)

2323.13 former GC 11597

APPENDIX C

JUDGMENT

Court of Civil Appeals
For The Ninth Supreme Judicial District of Texas
at Beaumont

Judgment Rendered February 3, 1972

D. W. Shaps
versus
Union Commerce Bank

No. 7308

from District Court of Dalla County.

Opinion by Associate Justice Homer E. Stephenson

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellant, D. W. Shaps, and the sureties on his appeal bond, Harold B. Berman and Jay S. Fichtner, pay all costs in this behalf expended; and this decision be certified below for observance.

Order, made February 24, 1972 overruling motion for a rehearing Cause No. 7308; D. W. Shaps vs. Union Commerce Bank from Dallas County; motion for rehearing; the motion is overruled.

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APPENDIX D

JUDGMENT

Supreme Court of Texas

No. B-3296 May 3, 1972

From Dallas County, Ninth District.

D. W. Shaps
versus
Union Commerce Bank

Application of petitioner for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, D. W. Shaps and sureties, Harold B. Berman and Jay S. Fichtner, pay all costs incurred on this application.

No. B-3296 July 26, 1972

From Dallas County, Ninth District.

D. W. Shaps
versus
Union Commerce Bank

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is or-

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dered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 28th day of July, 1972.

GARSON R. JACKSON, Clerk
(Mrs.) Jewell F. Seeliger, Deputy

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APPENDIX E

COGNOVIT NOTE

Cuyahoga 1/30/68

CLEVELAND, OHIO, January 11, 19 68 $ 20,000.00

ON DEMAND ..... DAYS AFTER DATE, THE UNDERSIGNED JOINTLY AND SEVERALLY, IF MORE THAN ONE, PROMISES TO PAY TO THE ORDER OF

UNION COMMERCE BANK

.....TWENTY THOUSAND AND 00/100..... DOLLARS

at its office in the City of Cleveland, Ohio, with interest after date at the rate of 8% per annum payable Quarterly

and after maturity at the rate of eight per cent (8%) per annum, and has deposited with said lender pledges to said Bank as security for the payment of this and any and every other indebtedness of the undersigned to said Bank, whether joint or several, absolute or contingent, due or to become due, and whether hereinafter or heretofore contracted or created, and to whatsoever evidenced, discounted by or existing in said Bank, whether before or after maturity and whether the same be now or shall be participated, or shall in part, be subject to any assignment or otherwise sold hereinafter called "Obligations", on which pledges

I/WE give The Charles Corporation

The undersigned agrees to deliver to the holder additional collateral should the holder deem itself insecure.

At the option of the holder, all Obligations shall become immediately due and payable without notice or demand upon the occurrence of any of the following events of default: (a) failure of the undersigned, their or any of them to pay when due any obligation or indebtedness or perform any agreement on [illegible] (b) default in any of the covenants, conditions, [illegible] (c) the death, [illegible] (d) failure to pay when due any indebtedness owing by any of the undersigned hereunder; (e) levy, execution, attachment of creditors, assignment for the benefit of creditors, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against any maker, endorser or guarantor hereof, [illegible] (f) the occurrence of any such event of default, and in any case thereafter, the holder shall have the remedies of a secured party under the Uniform Commercial Code [illegible] to foreclose or dispose of the collateral hereunder at public or private sale or in one or more parcels at the discretion of the holder, and the undersigned severally waive all notices of any such disposition and all other rights and remedies of debtors, and agree to pay all reasonable attorneys' fees and all expenses incurred by the holder in connection with the collection of this note and the enforcement of its rights hereunder. The undersigned severally authorize the holder to sell any or all of the collateral at public or private sale or at any broker's board or on any securities exchange, at the option of the holder, and it is not necessary that the collateral or any part thereof be present at the place of such sale. The undersigned severally waive demand, notice or advertisement of such sale and payment of the purchase price in cash or its equivalent promptly upon delivery of the collateral, and the undersigned severally hereby agree that if any part of the collateral is sold on credit or for future delivery the holder shall not incur any liability in case the purchaser fails to take up and pay for the collateral so sold and, in case of any such failure, such collateral may be resold. The undersigned severally shall be and remain jointly and severally liable for any deficiency upon any disposition of the collateral, and the undersigned severally hereby waive all rights of redemption, stay or appraisal which they now have or may at any time hereafter have under any rule of law or statute now existing or hereafter enacted. The undersigned severally agree that the holder may accept collateral in addition to that described herein and may release any collateral without notice to the undersigned severally and without affecting the undersigned's liability hereunder. The holder shall not be bound to take any steps whatsoever to preserve any rights against prior parties, or to protect the collateral, or to give notice of any sale or other disposition thereof to any person.

Any deposits or other sums at any time credited by or due from the holder to any maker, endorser or guarantor hereof and any securities or other property of any maker, endorser or guarantor hereof at any time in the possession of the holder may at all times be held and treated as collateral security for the payment of the Obligations. The holder may apply or set off such deposits or other sums against said Obligations at any time or times, but shall not be required to do so. Any and all rights to require marshalling of assets by the holder are hereby waived.

The holder may at its option, whether or not the whole of the Obligations are then due, demand, sue for, collect, or make any compromise or settlement it deems desirable with reference to collateral held hereunder. The holder shall not be bound to take any steps whatsoever to preserve any rights against prior parties, or to protect the collateral, or to give notice of any sale or other disposition thereof to any person.

No delay or omission on the part of the holder in exercising any right hereunder shall operate as a waiver of such right or of any other right under this note. A waiver on any one occasion shall not be construed as a bar to or waiver of any such right on any future occasion.

[illegible] and agreements of this note, or the obligations represented hereby, matures [illegible] demand, [illegible] protest, and all other demands and notices in connection with the delivery, acceptance, performance, default or enforcement of this note, consents to any extension of time (at any one or more times) of payment of any other obligations, to any substitution, exchange or release of collateral, whether in the addition or release of any [illegible]

The undersigned, and, if more than one, each of the undersigned, hereby authorizes any attorney-at-law or agent to any court of record in the State of Ohio or in any other state or United States of the United States, or any [illegible] to appear for and confess judgment against the undersigned [illegible] in favor of the holder, as of [illegible] for the amount then appearing due, together with the costs of suit, and thereupon to release all errors and waive all rights of appeal and stay of execution. The undersigned severally hereby waive the benefit of all [illegible] and agree that a true copy of this note shall be filed in any [illegible] judgment or judgments against any one or more of the undersigned.

As herein used the word "holder" shall mean the payee or other endorsee of this note, who is in possession of it, or the bearer hereof, if this note is at the time payable to the bearer.

ADDRESS 2019 Fulton Rd. SIGNED D. V. Shapiro

Cleveland 13, Ohio

Send all notices to: % The Charles Corp.
19701 So. Miles Ave.
Warrensville Hts., Ohio

No. 70020

Due Demand

FORM NO. 52, CB REV. 1-1-63

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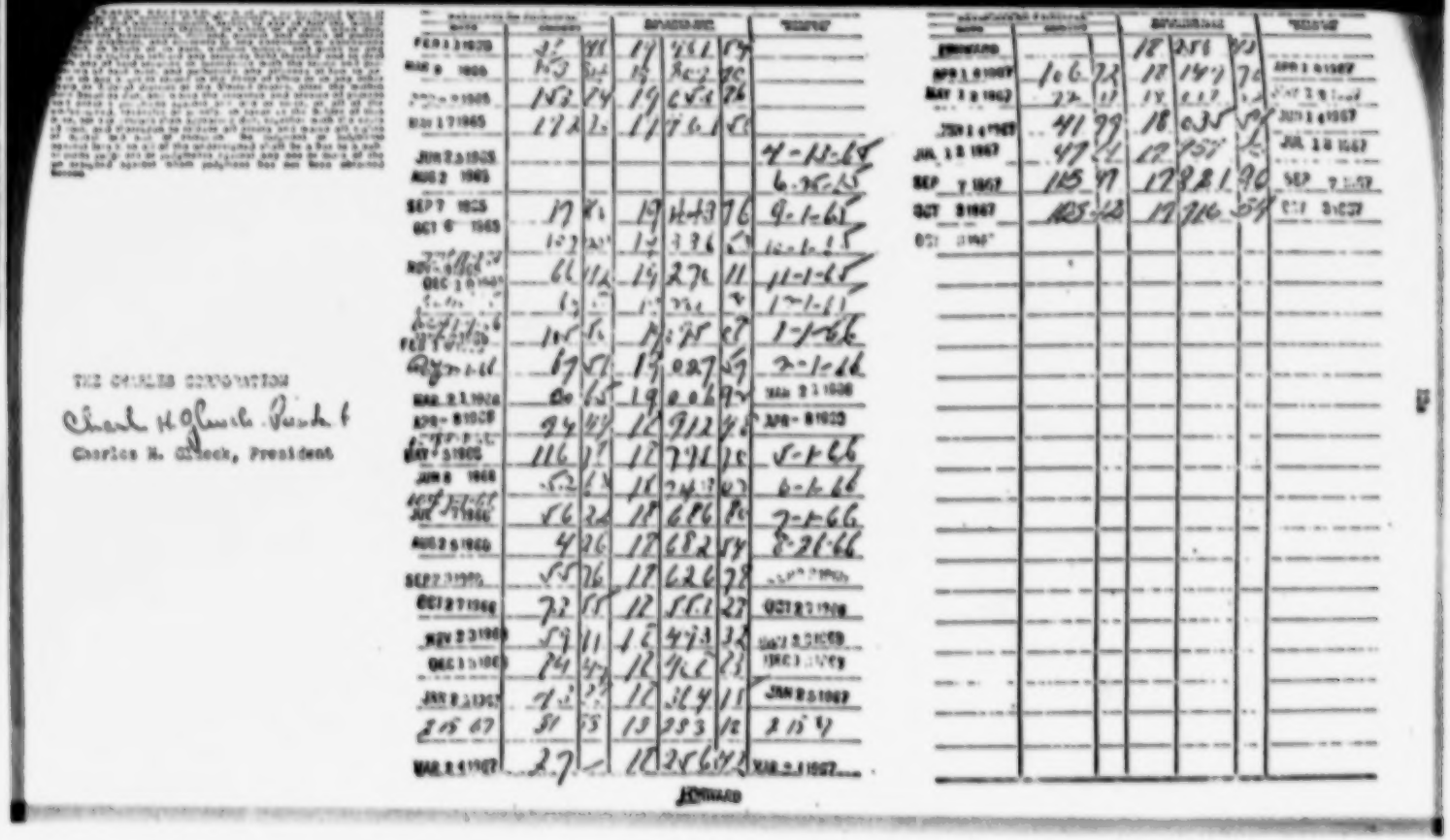

THE CHARLES CORPORATION

Charles H. Glueck, President

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